

The nett result of these judgments would show that bail should not be granted for cases under the Act where the provisions of s. 41B of the Act are brought into play. The restriction on bail under s. 41B of the Act is absolute and neither the Court below nor the High Court has power to admit to bail any person charged with an offence punishable with death or more than '5 years' imprisonment or even for lesser terms when the Public Prosecutor certifies in writing that it is against the public interest to allow bail. By employing clear and unambiguous words in s. 41B of the Act, the Legislature has tied the hands of the Courts, and the Courts must vigorously give effect to it. For the foregoing reasons, I am satisfied that there are no valid reasons for me to disturb the order of the Sessions Court Judge, and accordingly I affirm the said order.

Bail refused.

PUBLIC PROSECUTOR

v.

DORAIGUNARAJU A/L KRISHNAN

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK B. HJ.
ISHAK JC
[PERAK CRIMINAL TRIAL
NO. 55-18-92]
29 JUNE 1993

SENTENCING: Plea of guilty - Offence under s. 304(2nd limb) Penal Code - Culpable homicide not amounting to murder - Discretion of Court to determine term of imprisonment - Whether plea of guilty is a mitigating factor - Discount or credit for plea of guilty.

The Accused had pleaded guilty to an amended charge of culpable homicide not amounting to murder under s. 304 (2nd limb) of the Penal Code. The Court having ascertained that the Accused understood and appreciated the consequence and nature of his plea, recorded his plea of guilt and convicted him accordingly.

Held:

[1] It is trite law that no plea in mitigation should be brushed aside lightly but must in all fairness be examined and considered equally with the facts presented by the prosecution. Both aspects of the case (the prosecution and the defence) must be considered in their right perspective so as to strike, an equal balance, in the scales of justice.

[2] In this case, had the trial gone on, and at the end of the day the Accused found guilty, he would be sentenced to 7 $\frac{1}{2}$ years' or 90 months' imprisonment, with effect from the date of his arrest. But since, the Accused had pleaded guilty, on the basis of one-third discount, 5 years' imprisonment was imposed to run with effect from the date of his arrest (30 January 1991).

[Accused sentenced to 5 years' imprisonment with effect from date of arrest].

h Cases referred to:

R v. Kenneth John Ball [1951] 35 Cr. App. R 164 (**refd**)
Reg v. Davies [1978] 67 Cr. App. R. 207, 210 (**refd**)
Reg v. Sargeant [1974] 60 Cr. App. R 74, 77 (**refd**)
R v. Ladd & Tristram [1975] Crim. LR 50 (**refd**)
Mohamed Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405 / [1988] 1 MLJ 167 SC (**refd**)

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Legislation referred to:

Penal Code, ss. 302, 304

Other sources referred to:

Halsbury's Law of England, 4th Edn., para 483

For the Public Prosecutor - Murtazadi Amran, DPP
For the Accused - Mad Diah; M/s. Mad Diah & Co.

JUDGMENT

Hj. Abdul Malik b. Hj. Ishak JC:

On 28 May 1993 when the case came up for mention, the prosecution tendered a charge against the Accused person for murder under s. 302 of the Penal Code. The Court accordingly set 8 (eight) days for trial from 22 November 1993, to 30 November 1993.

Somehow by a stroke of fortune, the case came up for mention again. This time it was on 29 June 1993. The prosecution, by a sudden change of heart, amended the charge to one of culpable homicide not amounting to murder, punishable under the second limb of s. 304 of the Penal Code. The magnanimous gesture of the learned Deputy Public Prosecutor, the jealous guardian of criminal law in the country, in amending the charge, is appreciated by the Court.

The amended charge reads as follows:

Bahawa kamu pada 4 November 1991 jam lebih kurang 10.30 malam di Kampong Sungai Lilin, Taiping di dalam Daerah Larut dan Matang di dalam Negeri Perak Darul Ridzuan telah menyebabkan homisid salah tak terjumlah membunuh melalui perbuatan yang menyebabkan kematian Vikneswaran a/l Rajasekaran (Sijil Kelahiran H999597) dengan pengetahuan bahawa perbuatan itu akan menyebabkan bencana tubuh yang mungkin boleh menyebabkan kematian, tetapi dengan tiada apa-apa niat hendak menyebabkan kematian dan oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 304 (Bahagian kedua) Kanun Kesiksaan.

The amended charge was then read and explained to the Accused. He elected to plead guilty to the reduced charge and understood the nature and consequences of such plea.

The learned Deputy Public Prosecutor tendered the typewritten facts as exhibit (P1) and he then read out the statement of facts in open Court.

From the statement of facts in exhibit (P1) it is clear that the deceased was the step-son of the Accused. Briefly, the facts were:

Pada 4 November 1991 jam lebih kurang 10.30 malam OKT telah memukul simati dengan cara menampar muka simati secara

a kuat hingga menyebabkan simati terpelanting dan jatuh ke lantai simen rumah OKT. Simati pada masa itu berumur lebih kurang 2 tahun. Akibat daripada pukulan OKT dan hentakan kepala simati ke lantai simen tersebut, simati telah pengsan, OKT kemudian telah mandikan simati dan simati telah ditidurkan. Siasatan polis juga menunjukkan OKT seringkali memukul simati sebelum kejadian pada 4 November 1991 tersebut. Pada 11 November 1991, simati telah tidak sedarkan diri dan pengadu (ibu simati) telah membawanya ke Hospital Taiping. Simati telah meninggal dunia pada 11 November 1991.

c Hasil bedah siasat menunjukkan sebab kematian adalah akibat dari pendarahan dalam kepala (intracranial haemorrhage). Selain daripada itu kematian simati juga disebabkan oleh: "(i) meningitis, (ii) pneumonia of lung, (iii) septicaemia dan (iv) fatty change of liver." Menurut doktor yang melakukan bedah siasat ini, kecederaan yang terdapat pada simati yang menyebabkan kematiannya adalah akibat daripada kepala simati terhantuk pada dinding atau barang yang tidak tajam.

e OKT telah ditangkap pada 30 November 1991 dan di dalam percakapan amaran OKT telah mengaku memukul simati pada 4 November 1991 di rumahnya hingga menyebabkan kecederaan pada simati. Percakapan amaran OKT ditanda sebagai barang kes (P6).

The police investigated the case and this is what the investigations lead to:

f Kesimpulan daripada siasatan adalah didapati OKT telah melakukan perbuatan yang mendatangkan kecederaan kepada tubuh simati yang mana OKT mengetahui bahawa bencana pada tubuh simati itu boleh menyebabkan kematian, dan oleh yang demikian OKT telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 304 (Bahagian kedua) Kanun Kesiksaan.

After the learned Deputy Public Prosecutor had read out the facts, the Court carefully asked the Accused whether he understood the facts and whether he agreed to it. He was again asked whether he still maintained his plea of guilt. This was a slow process. Finally, the Court having ascertained that he understood and appreciated the consequences and nature of his plea, recorded his plea of guilt and convicted him accordingly.

i Encik Mad Diah, learned Counsel for the Accused, in his mitigation plea pointed out that the Accused was 33 years old, has a wife and 5 young

children. The Court was told that the Accused was a first offender who worked as a labourer. It was said that he was poor and at the time of the incident he tried to discipline the deceased who was in the habit of urinating in unspecified places. It was submitted that the standards of disciplining children would be dependent on a number of factors. In the case of the Accused, it was said that his poverty as reflected in the place of abode (see photographs P3A to K) should rightly be taken into account. It was also said that the Accused had been detained since his arrest, that is, 30 November 1991.

Learned Counsel urged me to take into consideration the all important factor that the Accused had pleaded guilty. It was strongly urged that in accordance with accepted sentencing practice, consideration should be given to this fact, especially the uncontroverted fact that a great deal of time and expense had been saved from an otherwise protracted trial. It was stressed that the Accused was remorseful for his action and that a long imprisonment term would deprive him of fending for his wife and children.

The learned Deputy Public Prosecutor, in his submission, said that the public interest should be protected. He said that the offence was serious and that the victim, at the material time, was only 2 years old. He stated that the fact that the Accused had pleaded guilty should not be taken into account bearing in mind that it was the Accused that caused the death of the deceased.

It is trite law that no plea in mitigation should be brushed aside lightly but must in all fairness be examined and considered equally with the facts presented by the prosecution. Both aspects of the case (the prosecution and the defence) must be considered in their right perspective so as to strike, an equal balance, in the scales of justice.

The Accused had pleaded guilty to an amended charge under the second limb of s. 304 of the Penal Code which carries the following punishment:

... shall be punished with imprisonment for a term which may extend to ten years, or with fine, or with both ...

This section gives the Court a wide discretion to determine the term of imprisonment which it may impose on the Accused. But such wide discretion must be judiciously exercised in

a accordance with the relevant and prevailing sentencing practice.

I need not dwell at length on the sentencing principles and guidelines which are well documented in the legal journals. But I must lay stress on the all important feature of sentencing that comes up, now and again. It is the public interest aspect of sentencing (see the dictum of Hilbery J. in *R v. Kenneth John Ball* [1951] 35 Cr. App. R 164). A prison sentence is necessary in this case but it must be consistent with the duty to protect the interests of the public and to punish and deter the Accused. To borrow the words of Lawton LJ in *Reg v. Davies* [1978] 67 Cr. App. R 207, 210:

b ... the Courts have to make it clear that crime does not pay and the only way they can do so is by the length of sentences. Sentences show the Court's disapproval, on behalf of the community, of particular types of criminal conduct.

c Looking at it from the angle of deterrence, there are two aspects of deterrence. Lawton LJ in *Reg v. Sargeant* [1974] 60 Cr. App. R 74, 77 nicely put it as such:

d There are two aspects of deterrence: deterrence of the offender and deterrence of likely offenders.

However, the Court is required to take into consideration a variety of factors before deciding on the appropriate sentence.

e They are:

- f** (1) the facts of the case including the cautioned statement of the Accused, the mitigation plea and the previous conviction record of the Accused;
- g** (2) the plea of guilty by the Accused as a mitigating factor and the consequential saving of time and money in avoiding a lengthy trial;
- (3) and, last but not least, those other factors stated in the early part of this judgment.

h Of pertinence would be the total degree of criminality involved and the comparison of past sentences. The Court must be sensitive and must endeavour to impose the right sentence for the criminality of the Accused. I can do no better than to quote the words of James J. in *R v. Ladd & Tristram* [1975] Crim. LR 50, when he said:

i We have to look out at the overall picture of what is the right sentence for the total involvement, the total degree of criminality

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[1993] 3 CLJ

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involved, and we have to keep the sentences in perspective with the sentences that have been passed on other occasions for offences involving criminal activity of this kind, though of course varying in their gravity. Clearly a deterrent element has to be involved, but because the offences are very serious, it does not necessarily follow that on the particular facts very long sentences are justified.

Now in regard to the comparison of past sentences, this Court has always embarked on giving discount or credit for the plea of guilty. The learned Deputy Public Prosecutor is conversant with the attitude of this Court in relation to offenders who plead guilty. The practice of giving credit or discount for pleading guilty finds support in the decision of the Supreme Court in *Mohamed Abdullah Ang Swee Kang v. PP* [1988] 1 MLJ 167 SC. As to the quantum of discount, Mohamad Azmi SCJ speaking for the Supreme Court, had this to say:

It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence.

In short, the Accused on a plea of guilty is entitled to a discount of between one-quarter to one-third of the sentence.

It must be borne in mind that the credit or discount is not in relation to the maximum sentence imposed by law (in this case: "... shall be punished with imprisonment for a term which may extend to ten years, or with fine, or with both ..."), but rather in a sentence which would have been imposed on the Accused had he claimed trial and had been found guilty on the amended charge under the second limb of s. 304 of the Penal Code (see **Halsbury's Law of England**, 4th Edn., paragraph 483).

In the circumstances, had the trial gone on, and at the end of the day, the Accused found guilty, he would be sentenced to 7 ½ years' imprisonment or 90 months' imprisonment with effect from the date of his arrest. But since he had pleaded guilty, on the basis of one-third discount, 5 years' imprisonment was imposed to run with effect from the date of his arrest (30th January, 1991).

Order accordingly.

**a TWENTY FIRST CENTURY OILS
SDN. BHD.**

v.

**BANK OF COMMERCE (M) BHD.
& 2 ORS.**

**b HIGH COURT, KUALA LUMPUR
DATO' SHAIK DAUD J.
[CIVIL SUIT BIL: D1-22-346-93]
5 JULY 1993**

c *PRACTICE AND PROCEDURE: Summary judgment - Order 14 Rules of the High Court 1980 - Admission by Counsel for the plaintiff that there are triable issues - Judgment on plaintiff's application for summary judgment will wipe out the writ which is heavily disputed - Affidavit must expressly depose and advert to the fact the defendant has no defence to the plaintiff's claim.*

d *COMPANY LAW: Debenture - Receivers and Managers appointed - Validity of appointment challenged - Defendants' oppose the challenge - Triable issue - Authority of ex-General Manager to affirm affidavit on the authority given by a single Director of plaintiff - Need for a collective resolution of the Board of Directors of plaintiff company - No implied authority for one Director to bind the company.*

e

The 1st defendant, Bank of Commerce (M) Berhad, ("the Bank") as the holder of Debentures dated 28 January 1988, 9 May 1991 and 5 November 1991 ("the Debentures") appointed the 2nd and 3rd defendants, as the Receivers and Managers, of the assets of the plaintiff, Twenty First Century Oils Sdn. Bhd. on the terms and conditions of the Debentures.

f

The plaintiff commenced proceedings by way of a writ challenging the appointment on the grounds that the appointment is not strictly in accordance with the provisions of the Debentures, and for this reason the plaintiff, sought an order, *inter alia*, that the 2nd and 3rd defendants, be removed as Receivers and Managers. The allegation that the appointment of the Receivers and Managers is in contravention of the provisions of the Debentures, is seriously challenged by the Bank, on the statement of defence filed on its behalf. The plaintiff then took out an application pursuant to O. 14 of the Rules of the High Court 1980, seeking, *inter alia*, an order for the removal of the 2nd and 3rd defendants, as Receivers and Managers of the plaintiff,

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